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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 476

COWBOY PINK WILLIAMS, State Treasurer, State of Oklahoma; A. F. SHAW, State Auditor, State of Oklahoma; J. D. DUNN, LAWTON LEININGER and MIKE CONNERS, comprising the Oklahoma Tax Commission, State of Oklahoma; and HASKELL PUGH, MATHER M. EAKES and FRANK RENEAU, comprising the State Election Board, State of Oklahoma,

Appellants,

VERSUS

HARRY R. MOSS,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RESPONSE OF APPELLANTS TO MOTIONS TO DISMISS

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November, 1963

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Two separate Motions to Dismiss have been filed in this cause. In substance, they are identical. This response is directed to both Motions, and the parties so moving will be referred to jointly as Appellees.

Appellees do not deny jurisdiction of this Court over this appeal. They do not deny that the questions are sub-

stantial. The only ground for dismissal advanced by Appellees is that the State of Oklahoma has somehow "confessed" that the constitutional and statutory provisions of Oklahoma relating to legislative apportionment violate the XIV Amendment to the United States Constitution; and hence, Appellants, state officials named defendants in the cause, lack standing to prosecute this appeal.

The argument is pure sophistry. It wholly ignores the issues here for decision, and the manner in which those issues arose in the District Court.

It should be noted that the (former) Attorney General of Oklahoma made no "confession" in pleadings, that any portion of the Constitution of Oklahoma, or its laws, contravened the United States Constitution.[1] Any such allegations were by private counsel appearing for former state officials.[2] Later developments in the cause rendered immaterial any question of their authority to make such a confession.

At the outset of this proceeding, all parties tacitly agreed that statutes then existing for apportionment of both houses of the Oklahoma Legislature did not comply with the *Oklahoma* Constitution. The District Court ultimately held that the same laws violated the United States Constitution as well.

After numerous hearings, the District Court entered a series of interlocutory decrees, the effect of which was to

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[1] Appendix to Motion to Dismiss of Council of Democratic Neighborhood Clubs, pp. i-ii.

[2] *Ibid.*, pp. iii-vi.

invalidate all reapportionment laws then existing, and certain provisions of the Oklahoma Constitution relating to legislative apportionment. *Moss* v. *Burkhart*, 207 F. Supp. 885, at 897, 898-899. This ruling was and had to be founded upon the Equal Protection Clause of Amendment XIV, United States Constitution. The ultimate decision at that stage, however, was to withhold final judgment to permit the 29th (1963) Oklahoma Legislature to enact new reapportionment laws under guide lines which the District Court suggested would meet required standards of Equal Protection of Laws, 207 F. Supp. at 898. A series of appeals from these orders were dismissed in this Court, apparently for the reason that they were premature.

When proceedings in the District Court resumed on March 8, 1963, the issues, as well as the parties, had altered considerably. The 29th Legislature had enacted S.J.R. No. 8 and H.B. No. 586, for apportionment, respectively, of the State Senate and House of Representatives of Oklahoma. These acts were submitted to the Court as an apportionment accomplished by the State through its Legislature, which acts comply both with the provisions of the Oklahoma Constitution, and with required standards of Equal Protection of Laws. Thereafter, the District Court assumed the 1963 laws complied with the Oklahoma Constitution. From that point onward, the principal issue before the District Court was whether either or both of these newly enacted reapportionment laws necessarily resulted in "invidious discrimination" in voting strength among legislative representative districts, and thus denied Oklahoma citizens

Equal Protection of Laws guaranteed by the XIV Amendment, United States Constitution.

The District Court noted that the 1963 apportionment laws were not yet effective, for want of an emergency clause, and might never become so, if subjected to referendum prior to their effective date of September 12, 1963. It happened, however, that no referendum petition was filed; and S.J.R. 8 and H.B. 586, if they are constitutional, are now the law of Oklahoma governing apportionment of its Legislature.

Necessarily, the District Court determined these legislative Acts to be invidiously discriminatory, if and when they should become law.[3] Otherwise, any judicial reapportionment necessarily would have been superseded by those laws, if they remained unchallenged on September 12, 1963.

Thus, the ultimate issues upon this appeal are these: If the 1963 legislative apportionment acts (S.J.R. 8 and H.B. 586) meet required standards of Equal Protection under the XIV Amendment to the United States Constitution, the Final Decree of the District Court entered July 17, 1963, is wrong, and must be reversed. On the other hand, if those acts fail, in whole or in part, to afford Equal Protection of Laws to Oklahoma citizens, the further question arises, whether, and to what extent, the Federal Courts may properly impose and enforce a judicially fashioned reapportionment upon the State.

Nobody in authority has confessed judgment against the State of Oklahoma upon either of these issues. The questions outlined in the Notice of Appeal and in the Juris-

[3] Appendix to Jurisdictional Statement, pp. iv-ix.

dictional Statement constitute the particular legal questions which will be determinative of these ultimate issues.

CONCLUSION

The State of Oklahoma will and must defend its Constitution against any claim that provisions thereof contravene the XIV Amendment to the United States Constitution. Appellants, as state officials concerned, and the Attorney General as their counsel, cannot do otherwise in performance of their official duties. Likewise, the State must defend the reapportionment laws enacted by the Oklahoma Legislature where there exists any reasonable theory upon which the constitutionality thereof can be upheld.

The final decree of the District Court invalidating these portions of the Constitution and Laws of Oklahoma necessarily has aggrieved the State, and Appellants as state officials against whom the action was brought. Appellants are the proper parties to perfect this appeal, designed to test the correctness of the final judgment entered by the District Court.

The Motions to Dismiss are without substance. Appellants respectfully suggest that the motions should be denied, that probable jurisdiction should be noted, and the cause stand for argument on the merits.

CHARLES NESBITT
Attorney General of Oklahoma
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Counsel for Appellants

November, 1963

CERTIFICATE OF SERVICE

CHARLES NESBITT, Attorney General of Oklahoma, counsel for Defendants-Appellants named in the Response to Motions to Dismiss to which this certificate is attached, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on ..... day of November, 1963, I served copies of the foreging Response to Motions to Dismiss on the several parties to this action by mailing copies in duly addressed envelopes, with first-class postage prepaid thereon, to their respective counsel of record, as follows:

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